IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC.; REACH ONE, TEACH ONE OF AMERICA, INC.,	)	
PLAINTIFFS,	)	
v.	)	**CIVIL ACTION NO.: 3:06-cv-224-WKW**
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
DEFENDANT.	)	

SHERIFF DAVID WARREN'S RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER

COMES NOW Sheriff David Warren, Defendant in the above-styled cause, ("Defendant"), by and through his counsel of record, and responds to Plaintiffs' Motion for Reconsideration dated November 21, 2007 (Doc. 94 and 95) as follows:

Plaintiffs' Motion for Reconsideration is due to be denied on three grounds. First, the *Federal Rules of Civil Procedure* do not provide for a motion for reconsideration. While courts have chosen to recognize motions to reconsider in three limited circumstances, Plaintiffs fail to make the requisite showing on any of the permissible categories for reconsideration. Second, this Court correctly found, after reviewing cross motions for summary judgments, responses, replies, the complete depositions of all the parties, and hundreds of pages of exhibits, that the Plaintiffs lacked standing to maintain this action. Finally, even if this Court incorrectly denied standing based upon the incomplete application, Plaintiffs still lack standing because the Plaintiffs do not satisfy the requirements for a license apart from the three specific requirements that they have challenged.

I. STANDARD FOR GRANTING MOTION FOR RECONSIDERATION

"A motion for reconsideration is not a form of relief explicitly conferred by the Federal Rules of Civil Procedure." *Bell v. Houston County, Georgia*, 2007 WL 4146205 (M.D. Ga. Nov. 19, 2007). While the Plaintiffs in the instant case do not rely upon Rule 59(e) as the basis for their Motion for Reconsideration, "motions seeking to have the court 'reconsider' an earlier ruling are usually governed by Rule 59." *Bell*, 2007 WL 4146205, *2 (M.D. Ga. Nov. 19, 2007). "'In the interests of finality and conservation of scarce judicial resources, reconsideration of an order is an extraordinary remedy and is employed sparingly.'" *Ohio Casualty v. Holcim (US) Inc.*, 2007 WL 4189503 (S.D. Ala. Nov. 20, 2007)(quoting *Gougler v. Sirius Products, Inc.*, 370 F.Supp.2d 1185, 1189 (S.D. Ala. 2005)). See also, *Spellman v. Haley*, 2004 WL 866837, *2 (M.D. Ala. Feb. 22, 2002)(stating that "litigants should not use motions to reconsider as a knee-jerk reaction to an adverse ruling"). The decision of whether to alter or amend a judgment pursuant to Rule 59(e) is committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion. *Mincey v. Head*, 206 F.3d 1106, 1137 (11th Cir. 2000); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993).

The law of this Circuit is clear; a litigant cannot use a Rule 59(e) motion to relitigate old matters, raise arguments or present evidence that could have been raised prior to the entry of judgment. *Michael Linet Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 764 (11th Cir. 2005); *Gougler v. Sirius Products, Inc.*, 370 F.Supp.2d 1185, 1189

(S.D. Ala. 2005)(stating that "motions to reconsider are not a platform to relitigate arguments previously considered and rejected."). Instead, a motion to reconsider is only available in three limited circumstances: "(1) when a party presents the court with evidence of an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or manifest injustice." *Summit Medical Center of Ala., Inc. v. Riley*, 284 F. Supp. 2d 1350, 1355 (M.D. Ala. 2003); *Groover v. Michelin North Amer., Inc.*, 90 F.Supp.2d 1236, 1256 (M.D. Ala. 2000). *See also*, *Eslava v. Gulf Telephone Co.*, 2007 WL 1958863 (S.D. Ala. July 2, 2007).

Plaintiffs do not allege that there has been any change in controlling law or that new evidence has come to light. Plaintiffs base their motion solely on the clear error or manifest injustice prong of the analysis. Specifically, Plaintiffs argue the Court committed the following points of error: (1) Plaintiffs claim that, contrary to the Court's finding, they impliedly challenged the 2003 Rules in their Complaint and Amended Complaint by virtue of the fact that they challenged the First Amended Rules and Second Amended Rules; (2) Plaintiffs claim that their application for a bingo license complied with the rules; and (3) contrary to undisputed evidence presented, Plaintiffs claim that Reach One is an active organization in good standing in Macon County.

Plaintiffs filed a Motion for Summary Judgment (Doc. 61), a Reply to Sheriff Warren's Response to Plaintiffs' Motion for Summary Judgment (Doc. 74), and a Response to Sheriff Warren's Motion for Summary Judgment (Doc. 71). Thus, Plaintiffs had not two, but three bites at the proverbial apple to make the arguments they now raise on reconsideration. Upon a careful review of Plaintiffs' Motion it is clear that Plaintiffs do not meet their burden of showing clear error or manifest injustice. In support of their

Motion, Plaintiffs rely upon deposition testimony and exhibits that were submitted to and considered by this Court when it ruled on the parties' motions for summary judgment; however, these arguments amount to nothing more than an attempt to relitigate and rehash arguments previously made and rejected by this Court and an attempt to raise arguments that could or should have been made at the summary judgment stage.

II. THIS COURT CORRECTLY FOUND THAT THE PLAINTIFFS LACKED STANDING TO MAINTAIN THIS ACTION.

A. Plaintiffs Claim That, Contrary to the Court's Finding, They Impliedly Challenged the 2003 Rules in Their Complaint and Amended Complaint by Virtue of the Fact That They Challenged the First Amended and Second Amended Rules.

In their Complaint and Amended Complaint, Plaintiffs asserted a single claim for violation of the equal protection clause of the Fourteenth Amendment. (Complaint ("Comp."). at ¶s 18-24; Amended Comp. at ¶s 20-26.) Plaintiffs challenged only three specific requirements in the First Amended Rules and the Second Amended Rules. Contrary to Plaintiffs' new argument in their Motion for Reconsideration, Plaintiffs never challenged any of the provisions of the 2003 Rules. As this Court correctly found, the Plaintiffs only challenge two of the amendments in the First Amended Rules: (1) the $15 million capital investment requirement, and (2) the requirement that at least 15 nonprofit organizations obtain Class B Bingo licenses prior to conducting a bingo operation at a qualified location. (Comp. at ¶ 11) (2004 Rules §§ 1(j) and 2.) (Memorandum Opinion at pg. 8-9, Doc. 91.) The Plaintiffs object to only one of the amendments in the Second Amended Rules– the amendment which provides that at no time shall there be more than 60 Class B Bingo licenses in Macon County. (Amended Comp. at ¶ 13, Doc. 20.) (Memorandum Opinion at pg. 8-9, Doc. 91.) Nowhere in Plaintiffs' Original or Amended

Complaint do they challenge the 2003 Rules. Plaintiffs' prayer for relief only sought relief from the amendments and not from the 2003 Rules. Sheriff Warren argued in his Motion for Summary Judgment that the Plaintiffs did not challenge the 2003 Rules. (*See* Sheriff Warren's Brief in Support of Motion for Summary Judgment at pg. 49.) Plaintiffs did not dispute this fact in their Response. Plaintiffs should not now use a motion for reconsideration to raise a new argument that is not supported by their Complaint, Amended Complaint, or the extensive briefing in this case. Therefore, this Court's finding that the Plaintiffs did not challenge the 2003 Rules does not constitute clear error or manifest injustice and Plaintiffs' argument on this ground is due to be rejected.

B. This Court Correctly Found That Reach One's Application for a Bingo License Failed to Comply with the Rules.

As this Court correctly found, Plaintiffs Reach One failed to submit the information required by the 2003 Rules when Reach One submitted its application for a Class B Bingo license. Plaintiffs now argue in their Motion for Reconsideration that Reach One's defective and incomplete application should not be held to a higher standard than an application submitted by another nonprofit organization. This argument is due to be disregarded. Plaintiffs attempt to compare Reach One's application with an application submitted by the Tuskegee Human and Civil Multicultural Center ("Multicultural Center"). First, Plaintiffs compare only two pages of the Multicultural Center's application package with the application package submitted by MCII ostensibly on behalf of Reach One.

Second, even comparing those two pages against the information submitted on behalf of Reach One, it is clear that the information submitted in Reach One's application does not rise to the level of the information submitted by the Multicultural Center.

Indeed, it appears that Reach One or MCII re-typed or drafted their own application form because the application form used by Reach One omits certain requested information. Namely, the "Personal Data Sheet" on the Reach One application fails to provide complete information regarding the officers and directors. Unlike the Multicultural Center, Reach One did not provide the Sheriff with this information.

Next, regardless of the new arguments raised by Plaintiffs in their Motion, the undisputed evidence demonstrates that MCII has no assets, no liabilities, no bank accounts, no property, no equipment, and no facility of any kind. (Thomas depo. at 50:3-10; 51:17-23; 52:1-4; 54:1-9.) MCII failed to produce a copy of any expenses that it has supposedly borne in its efforts to obtain a bingo license. In addition, Reach One failed to produce records for its corporate meetings and any evidence of its charitable activities. Walker testified during his deposition that Reach One had minutes and that he could obtain and produce them. (Walker depo. at 100:7-100:15.) However, Reach One failed to produce a copy of any minutes. When asked under oath to give specific examples of Reach One's charitable activities, Walker could not recollect any charitable activities for the past two years. (Walker depo. at 81:12-18.) Walker failed to produce videotapes and photographs that he testified would provide evidence of its charitable activities. (Walker Dep. at 72:20-72:23; 84:18-84:22.) The only example of any charitable activity Walker could recall for the past three years was a single donation that Thomas made to cultivate goodwill in Macon County as part of their effort to obtain a bingo license. (Thomas depo. at 209:13 - 211:4; 213:22-23)(Walker depo. at 105:1- 111:13.)

Finally, the 2003 Rules and the bingo application require the nonprofit organization to submit a copy of the nonprofit organization's "charter, certificate of incorporation, bylaws, or other evidence of legal existence of the organization." (2003 Rules at § 4(c)(2), Memorandum Opinion at pg. 9.) Plaintiffs submitted a copy of MCII's Certificate of Incorporation with the application. (Doc. No.95-5) Plaintiffs did not submit a copy of Reach One's charter, certificate of incorporation, by-laws or any other evidence of Reach One's legal existence. (*See* Doc. 95-5.) Therefore, by Plaintiffs' own evidence it is clear that Reach One failed to submit a complete application.

III. ASSUMING ARGUENDO THAT THIS COURT INCORRECTLY DENIED STANDING BASED UPON THE INCOMPLETE APPLICATION, PLAINTIFFS STILL LACK STANDING BECAUSE THE PLAINTIFFS DO NOT SATISFY THE REQUIREMENTS FOR A LICENSE APART FROM THE THREE SPECIFIC AMENDMENTS THAT THEY HAVE CHALLENGED.

Even if this Court found that reach one's application was complete, the Plaintiffs still lack standing because they failed to comply with the requirements of the 2003 Rules. Although Plaintiffs seek to invalidate the First Amended Rules and the Second Amended Rules in an effort to obtain a Class B Bingo license permitting Plaintiff Reach One to conduct bingo games at a qualified location operated by Plaintiff MCII, the Plaintiffs are not entitled to a license under the 2003 Rules that they have not challenged. See *KH Outdoor, L.L.C.*, 482 F.3d 1299 (11th Cir. 2007). Reach One admitted in deposition that MCII does not have a facility and cannot meet the minimum capital investment requirement of $5,000,000.00 under the 2003 Rules. (Walker depo. at 194:8-197:6.) Plaintiffs also admitted in deposition that MCII lacked: (1) public liability insurance of at least $5,000,000.00; (2) if liquor is served, liquor liability insurance of at least $1,000,000.00; (3) adequate parking for patrons and employees; (4) onsite security as prescribed by the Sheriff; (5) onsite first aid personnel as prescribed by the Sheriff; (6)

accounting procedures, controls and security monitoring necessary to preserve and promote the operation of the bingo games and to ensure the protection of the charitable license holder and its patrons; (7) satisfactory evidence that the owner or owners of the location paid at least $5,000,000.00 for the land, building and other capital improvements comprising said location; (8) satisfactory evidence that the location is fully compliant with the ADA; (9) complete information regarding the officers and directors of Reach One; and (10) a tender of the bingo license fee. (Walker depo. at 194:8-197:6); (Thomas depo. at 51:17-19;229:2-8); (Warren Aff. at ¶ 24, 25.)

Moreover, while Plaintiffs attempt to rehabilitate the testimony of Frank Thomas and Walter Walker in their Motion to Reconsider, It is clear from the testimony elicited during the deposition of MCII's corporate representative that: (1) MCII never had a facility that could be inspected by Sheriff; (2) Reach One would not be eligible to obtain a Class B Bingo license even under the 2003 Rules; (3) MCII could not meet the definition of a "qualified location" even under the 2003 Rules; (4) MCII is not similarly situated to the other qualified location; and (5) neither Reach One nor MCII has suffered any losses whatsoever as a result of Sheriff Warren's actions.

Even if the Court agreed with the Plaintiffs' contentions concerning the challenged bingo licensing regulations, the Plaintiffs would not be entitled to a license as they have not complied with the requirements of the 2003 Rules. See *KH Outdoor*, 2007 WL 925282, at *4-*5. Like the plaintiff in *KH Outdoor*, the Plaintiffs here do not challenge any of the other requirements under the 2003 Rules. While Plaintiffs now claim in their Motion to Reconsider that they did challenge the 2003 Rules, this argument is due to be rejected because it was not raised in the Complaint, Amended Complaint, their Motion for Summary Judgment, or any response or reply to Sheriff Warren's Motion for Summary Judgment. Thus, as in *KH Outdoor*, the Plaintiffs' bingo application could be denied for failure to comply with these additional, unchallenged provisions. See *KH Outdoor*, 2007 WL 925282, at *5. Consequently, the Plaintiffs' equal protection claims are not redressable and Plaintiffs lack standing. See id.

Finally, the undisputed evidence shows that Plaintiffs have not established a prima facie violation of the Fourteenth Amendment's Equal Protection Clause. The Eleventh Circuit recognizes the following three distinct types of equal protection claims: (1) that a statute or regulation is facially discriminatory; (2) that neutral application of a neutral statute or regulation has a disparate impact; and, (3) that a neutral statute or regulation has been applied in an unequal manner to similarly situated persons. See *E&T Realty v. Strickland*, 830 F.2d 1107, 1112 n.5 (11th Cir. 1987); *Jackson v. City of Auburn,* 41 F. Supp. 2d 1300, 1308 (M.D. Ala. 1999). The Plaintiffs have failed to establish a prima facie case for any recognized type of equal protection claim.

WHEREFORE, above premises considered, Sheriff Warren respectfully requests this Court to deny Plaintiffs' Motion for Reconsideration.

Respectfully submitted,

/s/ James H. Anderson
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following by electronic means through the CM/ECF placing a copy of the same in the United States Mail, with proper postage prepaid, on this the 19TH day of December 2007:

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